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March 14, 2002

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RECEIVED

MAR 14 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
445 12th Street S.W., TW-B204
Washington D.C. 20554

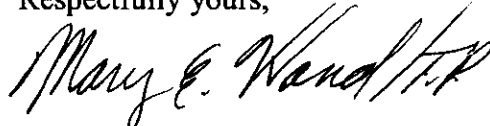
**Re: In the Matter of Conectiv Communications, Inc., Transferor and
New RC, Inc., Transferee for Authority to Transfer Control of
Domestic Section 214 Authority of Conectiv Communications,
Inc., CC Docket No. 02-2**

Dear Mr. Caton:

Enclosed please find an original and five copies of the Petition to Deny submitted on behalf of Yipes Transmission, Inc. Please stamp the fifth copy as having been received by your office and return it to the person delivering these documents.

Please contact me at the above number or Theresa Pringleton at (202) 887-8755 if you have any questions regarding this filing.

Respectfully yours,



Mary E. Wand
Counsel for Yipes Transmission, Inc.

Enclosures

cc: Aria Klees, Conectiv Communications, Inc.
C. Douglas Jarrett, Esq., Keller and Heckman, LLP
Anne Gwal, Conectiv
Michael J. Boland, New RC, Inc.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of)
)
Conectiv, Transferor)
)
and)
)
New RC, Inc., Transferee)
)
For Authority to Transfer Control of)
Domestic Section 214 Authority of)
Conectiv Communications, Inc.)

CC Docket No. 02-2

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

PETITION TO DENY

Pursuant to Section 214 of the Communications Act of 1934, as amended, 47 USC § 214 ("the Act") and in accordance with Section 63.52(c) of the Commission's rules, 47 CFR § 63.52(c), Yipes Transmission, Inc. ("Yipes") hereby submits this Petition to Deny the above referenced application for consent to transfer control of Conectiv Communications, Inc., a subsidiary of Conectiv, to New RC, Inc. ("the Application"). The Public Notice of the Application appeared on February 12, 2002.¹

SUMMARY AND BACKGROUND

New RC, Inc. ("New RC"), the transferee, is a wholly owned subsidiary of Potomac Electric Power Company ("PEPCO"). PEPCO provides electric utility services to customers in Washington D.C. and Maryland. Conectiv, the transferor, is a public utility holding company owning electric utilities, including Delmarva Power & Light Company and the Atlantic City Electric Company, as well as Conectiv Communications, Inc. PEPCO, Conectiv, and New RC have entered into a Merger Agreement whereby

¹ FCC Public Notice, Domestic Section 214 Application Filed by Conectiv Communications, Inc. to Transfer Control to New RC, Inc., Pleading Cycle Established, DA 02-330 (Feb. 12, 2002).

PEPCO will acquire Conectiv and PEPCO and Conectiv will become two wholly-owned subsidiaries of New RC.

Through its subsidiary PEPCO Communications, LLC, PEPCO owns a fifty percent interest in Starpower Communications (“Starpower”). Starpower provides bundled local and long distance telephone services, cable television, Internet dial-up and high speed access services to customers in the Washington D.C. metropolitan area.

Yipes is authorized to provide competitive local exchange services in a number of states including Maryland, Virginia, New Jersey, and the District of Columbia. In its capacity as a competitive local exchange carrier Yipes has sought access to poles, conduits, and other rights-of-way owned or controlled by PEPCO, as permitted by Section 224 of the Act and the Commission’s rules, 47 CFR § 1.1401 *et seq.*² Yipes first contacted PEPCO to obtain conduit access in January, 2001. To date, and despite Yipes’ diligent efforts, PEPCO has refused to engage in good faith negotiations with Yipes.

PEPCO’s refusal to negotiate with Yipes is a violation of the Commission’s rules and Section 224 of the Act. Such behavior has had the effect of inhibiting Yipes’ ability to provide telecommunications services to customers in those geographic area served by PEPCO. If the Commission grants the authority sought by the Application, then PEPCO, through its new corporate parent New RC, will be able to expand its anti-competitive and unlawful practices to those geographic areas that are now served by Conectiv and where Yipes is authorized to provide telecommunications services and may seek, at some time in the future, to access Conectiv conduit and rights-of-way as permitted by Section 224.

² Adopted in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (“*First Report and Order*”) (subsequent history omitted).

This includes portions of Virginia and New Jersey as well as additional geographic areas of Maryland not currently served by PEPCO. Such a result will harm Yipes' ability to provide telecommunications services in the expanded geographic area, to the competitive benefit of PEPCO's existing telecommunications subsidiary Starpower and future subsidiary Conectiv Communications.

Accordingly, transfer of the authority sought by the Application would not be in the public interest as it would allow PEPCO and New RC to expand their anticompetitive and illegal practices into the additional geographic areas currently served by Conectiv.

I. APPROVAL OF THE APPLICATION IS NOT IN THE PUBLIC INTEREST

The Application should be denied on the grounds that PEPCO and its subsidiary have violated Section 224 and the Commission's rules implementing Section 224, 47 CFR § 1.1401 *et seq.* through PEPCO's refusal to negotiate in good faith with Yipes. Instead, PEPCO has chosen to simply ignore the Commission's rules and not respond to Yipes' requests for access. Approval of the Application will permit New RC, as the future parent entity of both PEPCO and Conectiv, to continue to deny competitors access to its conduits and other rights-of-way, as required by Section 224 of the Act in the combined PEPCO/Conectiv service areas. Such behavior is not in the public interest.

The Commission's rules require that an application be denied if approval would be "prima facie inconsistent with the public convenience and necessity."³ PEPCO's compliance with the Communications Act and the Commission's rules and policies, including "the willfulness of any misconduct" and "the frequency of such behavior", are relevant considerations for determining whether approval is in the public interest.⁴ As

³ 47 CFR § 63.52(c).

⁴ See e.g. *Time Warner Entertainment Co. L.P. Advance/Newhouse Partnership, and Time Warner Entertainment-Advance Newhouse Partnership Transfer of Control*, 10 FCC Rcd 9300, 9303 ¶ 21 (1995) (citation omitted).

demonstrated below, PEPCO's refusal to negotiate in good faith with Yipes was both willful and continuous. To date, nearly fourteen months since Yipes first contacted PEPCO, an agreement under Section 224 is not in place. Such behavior is inconsistent with the public convenience and necessity and is sufficient to justify denial of the Application.

A. PEPCO Has Adopted A Policy of Ignoring the Commission's Rules Implementing Section 224.

Yipes' failed attempts to obtain a conduit and right-of-way access agreement with PEPCO demonstrate an explicit policy by PEPCO of refusing to comply with Section 224 of the Act and the Commission's regulations implementing that section. As shown in the attached affidavit of Mary E. Wand, Yipes' counsel for this matter ("the Wand Affidavit"), PEPCO has refused to respond to Yipes' initial verbal inquiries for conduit access, failed to comply with the Commission's regulations, including but not limited to 47 CFR § 1.1403, and simply ignored Yipes' efforts to resolve the matter.

Rather than complying with the Commission's regulations, PEPCO has taken the position that there simply is "no conduit available" anywhere in its geographic service area. This position is in clear contrast with the Commission's requirement that a utility, before denying access, must in good faith explore potential alternative accommodations.⁵ In addition, PEPCO has refused to provide Yipes with a written confirmation of its denial setting forth the basis of the denial and relating those reasons to Section 224(f)(2) of the Act, as required by the Commission's rules.⁶ As shown in the Wand Affidavit, these practices are isolated incidents. Rather, they have been consistent over an extended

⁵ *First Report and Order*, 11 FCC Rcd at 16076 ¶ 1163.

⁶ *Id.* at 16101 ¶ 1224; 47 CFR § 1.1403(b).

period of time and PEPCO has shown no signs of modifying its behavior absent action by this Commission.

B. Approval of the Application Will Allow PEPCO and New RC to Expand Their Anti-Competitive Practices into The Geographic Areas Served by the Conectiv Utilities

The transaction underlying the Application, if completed, will allow PEPCO to expand its geographic reach to include geographic areas now served by the Conectiv utilities where Yipes is authorized to provide competitive telecommunications services. A number of regulatory agencies, both state and federal, have jurisdiction to approve the transaction or specific elements of the transaction. Even though the authority sought by the Application is limited to the transfer of the domestic Section 214 authority held by Conectiv Communications, Inc., this Commission is the only regulatory agency with the jurisdiction to ensure that the transaction complies with the Act or will not likely to lead to violations of the Act. Accordingly, it is this Commission that must determine whether the anti-competitive and illegal behavior engaged in by PEPCO in violation of Section 224 warrants a finding that approval of the Application is not in the public interest. As demonstrated below, such a finding is warranted by the facts.

Approval of the Application will increase PEPCO's incentive to violate Section 224 as it will add yet another provider of telecommunications services to the PEPCO corporate structure that may benefit from its anticompetitive actions. Conectiv Communications provides interexchange services on a common carrier basis.⁷ PEPCO's

⁷ Application at 2.

existing subsidiary Starpower provides a variety of telecommunications and cable television services.⁸ Both of these companies will benefit from PEPCO's refusal to provide conduit access to potential competitors, such as Yipes. Approval, therefore, will provide PEPCO and New RC with strong incentives to expand its current policy of refusing to comply with Section 224 to the Conectiv companies and service areas.

Expansion of PEPCO's policy of ignoring Section 224 to the Conectiv companies would cause direct harm to Yipes. As noted above, Yipes is authorized and plans to provide telecommunications services in a number of geographic areas where Conectiv now operates. Expansion by PEPCO of its unlawful practices into these Conectiv service areas will inhibit Yipes' ability to provide telecommunications services, services that may compete directly with those provided by the PEPCO affiliated companies. The potential harm that may be caused by the continuation and expansion of PEPCO's actions is not in the public interest and warrants Commission denial of the Application or the imposition of conditions that will ensure PEPCO's future compliance with the law.

II. THE APPLICATION SHOULD BE DENIED OR CONDITIONED TO ENSURE FUTURE COMPLIANCE WITH SECTION 224

As demonstrated above, approval of the Application is not in the public interest and therefore should be denied. Approval of the Application will simply permit PEPCO to expand its anti-competitive policies to new geographic areas, thereby harming the competitors of its affiliated companies that provide telecommunications services. In the event that the Commission does not deny the Application, however, the Commission should, at a minimum, impose conditions on PEPCO to ensure that its past practices in violation of Section 224 of the Act are remedied. To this end, the Commission should

⁸ See e.g. Potomac Capital Investment Corporation, *Pepco Communications, L.L.C.*, available at www.potomaccapital.com/pepcom.cfm.

require that New RC prepare and submit annually a report documenting PEPCO and Conectiv's compliance with Section 224. Such a report should provide the Commission with information describing the companies' compliance with 47 CFR § 1.1403(b).⁹

CONCLUSION

For the reasons set forth above, approval of the Application is not in the public interest. The Commission should either deny the Application or condition its approval as described.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mary E. Wand", with a long horizontal flourish extending to the right.

Mary E. Wand
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
(415) 268-7000
(415) 268-7522 (facsimile)
mwand@mofo.com

Dated: March 14, 2002

⁹ This report could include, at a minimum, the date a written request for access was received from a carrier; if access was denied, the date of the written response and the reasons given for the denial; if access was granted, the date of the written agreement entered into by the parties; for those carriers with access agreements, how many specific requests for access have been granted and how many denied.

Certificate of Service

I, Theresa Pringleton, do hereby certify that I have on this 14th day of March, 2002, had copies of the foregoing PETITION TO DENY and attached AFFIDAVIT delivered to the following:

Aria Klees
Conectiv Communications, Inc.
800 King Street
P.O. Box 231
Wilmington, DE 19899-0231

C. Douglas Jarrett, Esq.
Keller and Heckman, LLP
1001 G Street, NW
Suite 500 West
Washington, DC 20001

Anne Gwal
Conectiv
800 King Street
P.O. Box 231
Wilmington, DE 19899-0231


Michael J. Boland
New RC, Inc.
701 Ninth Street, NW
10th Floor
Washington, DC 20068

Janice Myles
Common Carrier Bureau
Federal Communications
Commission
445 12th Street, S.W., 5-B145
Washington, DC 20554

Nandan Joshi
Office of the General Counsel
Federal Communications Commission
445 12th Street, S.W., 8-A820
Washington, DC 20554

William Dever
Common Carrier Bureau
Federal Communications
Commission
445 12th Street, S.W., 5-C266
Washington, DC 20554

Qualex International
Portals II
445 12th Street, S.W., Room CY-B402
Washington, DC 20554


Theresa Pringleton

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of)
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Conectiv, Transferor)
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For Authority to Transfer Control of)
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket No. 02-2

AFFIDAVIT

I, MARY WAND, declare as follows:

1. I am an attorney with Morrison & Foerster, counsel of record for Yipes Transmission, Inc. ("Yipes"), Petitioner in the above captioned proceeding. I am a member of the bars of the State of California and the District of Columbia. The facts set forth in this affidavit are made of personal knowledge, except as noted, and if called to testify thereto I could and would so do.
2. On July 16, 2001 Yipes requested my assistance obtaining access to conduit owned or controlled by the Potomac Electric Power Company ("PEPCO") in the District of Columbia and Maryland. Yipes had first contacted PEPCO regarding this matter in mid-January, 2001 but had been unable to obtain any agreement for access to PEPCO facilities.

3. On July 27, 2001 I sent a letter to Mr. Michael Boland (the letter is incorrectly addressed to Mr. Mike Bowlin) setting forth Yipes' request for conduit access and describing PEPCO's obligations under 47 USC § 224 to provide such access. A true and correct copy of this letter is attached as Exhibit-1.

Attached to Exhibit-1 is a true and correct copy of an e-mail message sent by Mr. Joe Ochoa, Yipes' Contract Administrator, to Ms. Mindy Herman of PEPCO's legal department. The message from Mr. Ochoa documents Yipes' attempts to obtain conduit access during the months of January and February, 2001 and identifies the specific locations where access is sought. This message represents the written request for access required by 47 CFR § 1.1403(b).
4. On July 31, 2001, Mr. Boland left me a voice mail message. He indicated that he had spoken with Mr. Ochoa and requested from him additional information that was required before proceeding with an agreement.
5. On August 1, 2001 Mr. Ochoa informed me that he had provided Mr. Boland with the additional information he requested.
6. On August 23, 2001 Mr. Boland sent to Mr. Ochoa for his review a draft lease for dark fiber in the PEPCO service area. Mr. Ochoa provided me with a copy of the document.
7. I reviewed and revised the draft agreement provided by Mr. Boland and on September 7, 2001 sent him a copy of the revised document with a cover memo briefly explaining the changes. A true and correct copy of the cover message is attached to this Affidavit as Exhibit-2.

8. I telephoned Mr. Boland on at least two occasions during the week of September 17, 2001 and left messages asking to discuss the revised agreement I had sent on September 7, 2001. Mr. Boland did not return my telephone phone calls.
9. On September 24, 2001, having not heard back from Mr. Boland, I sent him an e-mail message expressing Yipes' frustration with PEPCO's apparent refusal to negotiate a conduit access agreement in compliance with 47 USC § 224. A true and correct copy of this message is attached as Exhibit-3.
10. On September 28, 2001, still having received no response from Mr. Boland to either the revisions to the draft fiber lease agreement I sent on September 7, 2001 or to my telephone calls to discuss the matter, I sent a letter to Ms. Herman. A true and correct copy of this letter is attached as Exhibit-4.
11. On October 9, 2001 Mr. Boland telephoned me to discuss the access agreements sought by Yipes. During that conversation Mr. Boland told me that he had not had an opportunity to review the revised agreement I had sent to him in September. He also said that he was aware that Yipes' engineering personal were working with PEPCO personnel to gain access to certain locations but that, in the absence of a final agreement, he was going to instruct the PEPCO personnel to cease cooperating with Yipes until an agreement was in place and charges could be imposed for the necessary survey work. Mr. Boland also told me that there was no PEPCO conduit available. I indicated

that, based on his instructions to the PEPCO personal that they should cease working with Yipes, it was essential that we finalize an agreement as soon as possible and, to that end, offered to provide him with examples of both conduit and fiber lease agreements. Mr. Boland indicated that it would be helpful if we provided him with the sample agreements.

12. On the evening of October 29, 2001 Mr. Boland attempted to reach me by telephone and on October 30, 2001 he sent me an e-mail message indicating that the operations personal were making progress locating conduit and inquiring as to the status of the sample agreements I had committed to prepare. Mr. Boland also indicated that "it appears we are on the verge of wrapping this matter up." A true and correct copy of this message is attached as Exhibit-5. We spoke on the telephone later in the day on October 30 and I told Mr. Boland that I would send him the sample agreements in the near future.
13. On November 13, 2001 I sent to Mr. Boland, via e-mail, a sample conduit access agreement and a sample fiber lease agreement. A true and correct copy of the cover message accompanying these documents is attached to this Affidavit as Exhibit-6. I requested that Mr. Boland call me to discuss the agreements.
14. Mr. Boland never acknowledged receipt of the sample agreements I sent on November 13, 2001. On December 4, 2001 I sent Mr. Boland another e-mail message indicating that I have never heard back from him regarding the draft

agreements and sending him additional copies. A true and correct copy of this message is attached to this Affidavit as Exhibit-7.

15. Mr. Boland never acknowledged or responded to my December 4, 2001 message.

16. On February 20, 2002 I sent Mr. Boland another email message attaching additional copies of the sample agreements. In that message I expressed Yipes' increasing frustration with PEPCO's refusal to negotiate with Yipes and its intent to bring the matter to the attention of the Federal Communications Commission if it could not be resolved promptly. A true and correct copy of this message is attached to this Affidavit as Exhibit-8.

17. On February 22, 2002, having not received an acknowledgment or response to my February 20, 2002 message, I sent another email message to Mr. Boland with additional copies of the sample agreements. A true and correct copy of this message is attached to this Affidavit as Exhibit-9. Mr. Boland acknowledged receipt of these messages via email on February 26, 2002. A true and correct copy of his response is attached as Exhibit-10.

18. I have had no further contact with Mr. Boland or anyone else from PEPCO.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of March, 2002, in San Francisco, California.

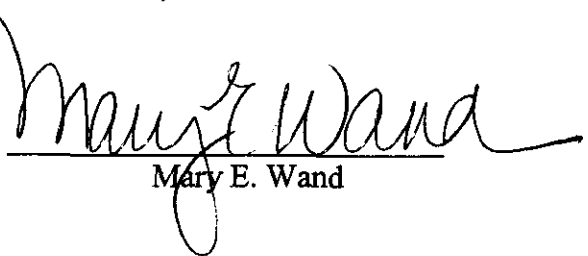

Mary E. Wand

Exhibit-1

MORRISON & FOERSTER LLP

LOS ANGELES
PALO ALTO
WALNUT CREEK
SACRAMENTO
ORANGE COUNTY
SAN DIEGO
DENVER
WASHINGTON, D.C.

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TOKYO

July 27, 2001

Writer's Direct Contact
(415) 268-7201
MWand@mofo.com

Mr. Mike Bowlin
Potomac Electric Power Company
Legal Department
1900 Pennsylvania Ave N.W.
Washington D.C. 20068

Re: Request for Access to Conduit

Dear Mr. Collison:

I am writing on behalf of Yipes Transmission, Inc., a competitive local exchange carrier authorized by the District of Columbia Public Service Commission ("the DC PSC") to provide services in Washington D.C. It is my understanding that you have spoken with Mr. Joe Ochoa of Yipes in the past regarding Yipes' need to access conduit that is owned or controlled by PEPCO so that Yipes may install fiber optic cables necessary to provide telecommunications services to the public, as authorized by the DC PSC. In addition, on March 6, 2001, Mr. Ochoa made a written request for access to PEPCO conduit along certain identified routes in the District. A copy of this request is attached for your information. To date, PEPCO has not responded to this request in a manner required by the Telecommunications Act of 1996, at 47 USC Section 224, or the rules promulgated by the Federal Communications Commission ("the FCC"), to implement this section of the Act. 47 CFR §1.1401 *et seq.*,

As you are aware, the Telecommunications Act of 1996 requires that "a utility shall provide a cable television system or any telecommunications carrier with non-discriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 USC Section 224(f)(1), 47 CFR §1.1403(a). The definition of utility includes, amongst other things, an electric company that "owns or controls poles, ducts, conduits, or rights-of-way use, in whole or in part, for any wire communications." 47 USC Section 224(a)(1), 47 CFR §1.1402(a). It is Yipes' understanding that PEPCO qualifies as a utility under these statutory provisions and therefore is obligated to provide Yipes with non-discriminatory access to PEPCO's poles, ducts, and conduits.

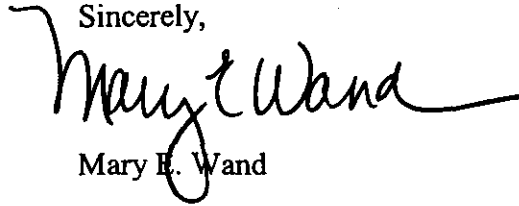
MORRISON & FOERSTER LLP

Mr. Mike Bowlin
July 27, 2001
Page Three

Section §224(f)(2) and 47 CFR §1.1403(b) by August 6, then Yipes reserves its rights to file a complaint against PEPCO at the FCC in accordance with 47 CFR §1.1404.

I can be reached at the above number if you have any questions regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary E. Wand", with a long horizontal flourish extending to the right.

Mary E. Wand

cc: Mr. Don Collison, PEPCO
Ms. Mindy Herman, PEPCO
Mr. Joe Ochoa, Yipes Transmission, Inc.

From: Joe Ochoa
Sent: Tuesday, March 06, 2001 12:51 PM
To: 'mhernan@pepco.com'
Subject: Franchise Agreements between PEPCO and Yipes

Dear Ms Herman:

The last time you heard from us was on January 19, 2001. Yipes Transmission, Inc. was seeking to enter into pole, conduit, and fiber agreements with PEPCO. Mr. Michael Bowlin from your office returned my call later that day indicating that we needed to talk with Mr. Gary Keeler. Mr. Keeler indicated that those duties are actually assigned to other gentlemen, Mr. William Lopez for the poles and Mr. Don Collison for the conduit and fiber.

A conversation with Mr. Collison on February 5, 2001, indicated that this is a very time consuming process. However, from the same conversation I left with the impression that the initial stage, which is an inspection on paper of our routes would take 1-2 weeks once they reached the Engineering department. A discussion with Mr. Collison's assistant, Mr. Nice, minutes ago indicated that the real estate department had pulled the plats to do a pre-inspection, but that there was no estimate of completion for this pre-inspection. I am the first to acknowledge that the recent weather and overall condition of facilities make for a time-consuming and difficult situation. Yet its frustrating for us to know that these routes which have been provided on February 6 and 14, 2001, have yet to leave the real estate division to go to Engineering.

Those three routes are

- 1.) 1200 New York Avenue, NW to 1275 K Street, NW
- 2.) 1050 Connecticut Avenue, NW to 1275 K Street, NW
- 3.) 1275 K Street, NW to 1301 K Street, NW

Discussions with co-counsel in our office have led to the conclusion that we might be better served by having our local counsel discuss the requests with you. These last 45+ days give the impression that nondiscriminatory access to the facilities is not being granted as required under 47 U.S.C. 224 (f)(1). We believe and hope that PEPCO's actions are not in any way reflective of anti-trust behavior given its proposed merger with Conectiv. We are only seeking the same terms and conditions that PEPCO and Conectiv provide themselves and each other.

We are writing to you to ask for your assistance with two things. First, would you provide us with an exemplar for conduit and fiber agreements? Past requests to either Ms Sharon Mesenio and Mr. Collison have been fruitless. Second, while we do not want or expect preferential treatment, we would like to see this accomplished in a professional and reasonably prudent time frame. Would you see that our three routes make it to Engineering?

If you desire, I am able to provide you with a complete log of telephone messages, conversations, and electronic mail which has led me to seek your assistance again. If it is reasonably possibly, I would appreciate a response within the next forty-eight hours. Thank you for your attention to these requests.

Joe Ochoa

Legal Department

Yipes Transmission, Inc.

(415) 901-2000 x235

(415) 677-9534 Fax

Yipes...That's Fast!

jochoa@yipes.com

Exhibit-2

Wand, Mary E.

From: Wand, Mary E.
Sent: September 07, 2001 5:57 PM
To: 'mjboland@pepco.com'
Cc: 'jochoa@yipes.com'
Subject: Attached Files



redline version of
PEPCO agree...



YipesPEPCO
agreement recovered...

Mike,

Welcome back from vacation! Attached are clean and redlined versions of the fiber optic cable agreement showing our proposed changes. We have drafted the agreement as a lease of fiber optic cable that is owned by PEPCO but would like to discuss with you alternative ownership/lease structures. The vast majority of the changes are editorial, making the ownership/lease structure consistent throughout, eliminating duplicative or contradictory sections, etc. We did eliminate the requirement of giving 24 fibers to PEPCO, as that is not consistent with a number of legal and policy requirements.

Please call us at your earliest convenience to discuss this matter, Yipes would like to finalize the agreement as soon as possible.

I can be reached at (415) 268-7201.

Regards,

Mary Wand

Exhibit-3

Wand, Mary E.

From: Wand, Mary E.
Sent: September 24, 2001 10:20 AM
To: Mike Boland (E-mail); 'mherman@pepco.com'
Cc: Bruce Holdridge (E-mail); 'jochoa@yipes.com'
Subject: Yipes Conduit Lease Agreement

Mike --

I tried to reach you by telephone last week to discuss the draft Fiber Lease Agreement which you provided to me and which I sent back to you on Sept. 7 with suggested revisions. Having not heard back from you I am now sending this email to followup. As I indicated in my cover message with the draft agreement, Yipes Transmission is willing to consider a fiber lease agreement in a form that is standard to the industry, but it also wanted to discuss alternative ownership arrangements. Over the past week, Yipes management has taken a closer look at the issue and has determined that it first preference continues to be an agreement for lease of conduit only, as originally requested back in January of this year. Yipes Transmission personnel will continue to work with Mr. Don Collision towards this end and I expect that you will be involved in that process. As I stated in my July 27, 2001 letter to you, Section 224 of the Communications Act requires all utilities such as PEPCO to provide competitive local exchange carriers such as Yipes Transmission with access to its poles, conduits, ducts, and other rights of way. To date it would appear that PEPCO has failed to comply with both the Act and the FCC regulations implementing the Act -- that is, the fiber agreement proffered by PEPCO does not meet the Section 224 requires for access to poles, conduit, duct and other rights of way. In the event that PEPCO does not respond to Yipes' request as required by the FCC regulations, Yipes Transmission is prepared to pursue what ever remedies are available at the FCC.

I can be contacted at the number below or via email if you have any questions.

Mary E. Wand
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105
(415) 268 7201
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Exhibit-4

MORRISON & FOERSTER LLP

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September 28, 2001

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MWand@mofo.com

Ms. Mindy Herman, Esq.
Assistant General Counsel
Potomac Electric Power Company (PEPCO)
1800 Pennsylvania Ave N.W.
Washington D.C. 20006

Re: Yipes Transmission, Inc. Access to Conduit

Dear Ms. Herman:

As you may be aware, Yipes Transmission, Inc., ("Yipes") a competitive local exchange carrier authorized to provide services in the District of Columbia, Maryland and Virginia, has been attempting since January of this year to obtain access to PEPCO conduit in order to install fiber optic cable. On July 27, 2001 I sent a letter on behalf of Yipes to Mr. Michael Boland, copying you, indicating that PEPCO's refusal to engage in good faith discussions with Yipes was a violation of Section 224 of the Federal Communications Act and the Federal Communications Commission regulations implementing that section. Shortly thereafter PEPCO personnel informed Yipes that vacant conduit was in fact available and provided a document that purported to be a draft fiber lease agreement. I reviewed that document and made a number of suggested revisions and returned it Mr. Boland on September 7, 2001 with a request that we discuss alternative facilities ownership arrangements from what was set forth in the draft document. After many, many months of delay Yipes was optimistic that an access agreement was near at hand.

It now appears that Yipes' optimism was misplaced. Despite attempting to contact both you and Mr. Boland via telephone and email to discuss the status of the agreement I have been unable to reach either of you. PEPCO's continuing failure to respond to any of Yipes' requests for conduit access, including the most recent specific request in our July 27 letter, and its refusal to provide us with a draft access agreement consistent with generally acceptable industry practices or, respond to our comments and revisions to that document, place PEPCO squarely in violation of Section 224 of the Communications Act and the FCC's regulations as set forth in 47 CFR § 1.1403.

MORRISON & FOERSTER LLP

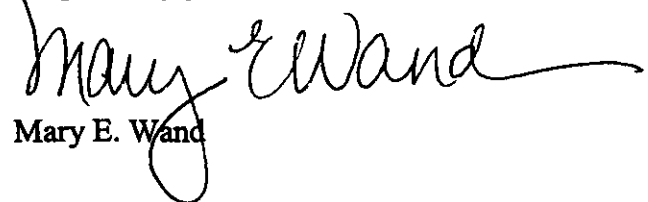
Ms. Mindy Herman, Esq.
September 28, 2001
Page Two

Accordingly, absent any immediate progress on this matter, Yipes is prepared to file a complaint at the FCC in accordance with the procedures set forth in 47 CFR § 1.1404 *et seq.*

We do not believe that an FCC complaint is in either parties' interest, as it will likely delay Yipes' much needed access to PEPCO conduit and subject PEPCO to FCC enforcement action. Nonetheless, PEPCO's refusal to engage in good faith discussions appears to leave Yipes with little alternative at this point. At the same time, Yipes intends to continue to attempt to reach an agreement absent FCC involvement. To expedite this process, and as I have offered to Mr. Boland on several occasions, Yipes is prepared to provide you with a generic conduit access agreement that has been used by electric utilities in other jurisdictions if that will help start this process.

I expect to hear from you shortly on this matter.

Respectfully yours,



Mary E. Wand

cc: William T. Torgerson, PEPCO General Counsel
Michael Boland, PEPCO
Bruce Holdridge, Yipes Transmission, Inc.

Exhibit-5

Wand, Mary E.

From: mjboland@pepco.com
Sent: October 30, 2001 8:23 AM
To: mwand@mofo.com
Cc: jochoa@yipes.com
Subject: RE: backbone and bldg estimate

Mary, I have been unsuccessful at reaching you by phone so I am sending you this message. As you can see from the attached messages, the operations folks have continued to make progress. However, as we discussed a couple of weeks ago, we need to get an agreement in place to perform any work. When we spoke last, you were going to forward some agreements that you had in place with other utilities. I have not received anything from you in that regard. Please let me know the status and how you wish to proceed. I have recently heard through the grapevine that Yipes is shopping for counsel in DC to represent it before the FCC. I hope this is old news, since it appears we are on the verge of wrapping this matter up. I believe a proceeding before the FCC would only delay matters. Mike

Michael J. Boland
 Assistant General Counsel
 Potomac Electric Power Company
 701 Ninth Street, N.W. 10th Floor
 Washington DC 20068
 202.872.2520
 Fax 202.872.3281
 Email: mjboland@pepco.com

----- Forwarded by Mike J Boland/EP/PEP on 10/30/2001 11:05 AM -----

Wilbert A Ollison

10/30/2001 10:52 AM **To:** David Noce <DNoce@yipes.com>
cc: Gary L Keeler/BENN/CEC@PEP, Mike J Boland/EP/PEP@PEP
Subject: RE: backbone and bldg estimate [Link](#)

Dave, presently Pepco is in no position to throw in any free building installations as part of the estimated cost for the backbone installation. Please contact me with any other concerns.
 Will

David Noce <DNoce@yipes.com>

10/26/2001 01:14 PM **To:** "waollison@pepco.com" <waollison@pepco.com>
cc: JT Archer <JTArcher@yipes.com>
Subject: RE: backbone and bldg estimate

Wil,

Thanks again for speaking with JT and I over the phone earlier this week. Your clarification of the estimated costs will assist us with getting our appropriate approvals.

3/7/2002

As we mentioned, throwing in some buildings as part of the estimated costs would be "icing" on the cake for us and make it easier for us to get started. Anyway, below are buildings that we desire right off the bat:

- 1) 1301 K Street, NW (you had already visited this site)
- 2) 815 Connecticut Ave., NW (you had already visited this site)
- 3) 1050 Connecticut Ave., NW (You had already visited this site)
- 4) 1729 21st Street NW
- 5) 1120 Vermont Ave., NW
- 6) 1100 New York Ave., NW
- 7) 1333 New Hampshire Ave., NW
- 8) 4100 Wisconsin Ave., NW
- 9) 1875 I Street, NW
- 10) 2099 Pennsylvania Ave., NW

Let us know your thoughts. Thanks.

David Noce

Director of Operations (DC & PA)

ylPes!.....that's fast

2100 Reston Pkwy., Suite 450

Reston, VA 20191

Office (703) 860-6806

Cell (703) 856-4318

Pager (703) 741-9273

Fax (703) 860-8713

-----Original Message-----

From: waollison@pepco.com [mailto:waollison@pepco.com]

Sent: Friday, October 19, 2001 1:00 PM

To: David Noce

Subject: Re: backbone and bldg estimate

----- Forwarded by Wilbert A Ollison/BENN/PEP on 10/19/2001 12:57 PM -----

Wilbert A Ollison

10/19/2001 12:56 PM

To: Wilbert A Ollison/BENN/PEP@PEP

cc:

Subject: Re: backbone and bldg estimate [Link](#)

Dave the estimates as follows:

Downtown DC Loop: Approx. Duration 13 weeks - Cost - \$520,000.00. Additional \$20,000.00 per each service connection.

Bethesda Loop: Approx. Duration 6 weeks - Cost - \$240,000.00. Additional \$20,000 per each service connection.

Silver Spring Loop: Approx. Duration weeks - Cost - \$320,000.00. Additional \$20,000.00 per each service connection.

Test Fiber Reel - \$500.00 per reel

Splice/Terminate fiber - \$8,000.00 per week

Material Cost - innerduct, pull rope, fire tape, and couplings. Approx. \$100,000.00.

3/7/2002

You supply fiber optic cable
Add 10% contingency to all totals.
Thanks , Will

Call me for further clarifications 202 388-2561,office, 301-765-1749,pager,240 508-3611,cell

Wilbert A Ollison

10/16/2001 02:38 PM

To: David Noce <DNoce@yipes.com>

cc:

Subject: Re: backbone and bldg estimate [Link](#)

Dave, I've been real busy starting the Georgetown Project. Look for an estimate by Friday.
Will

David Noce <DNoce@yipes.com>

10/15/2001 01:01 PM

To: "waollison@pepco.com" <waollison@pepco.com>

cc:

Subject: backbone and bldg estimate

Will,

Hope you had a pleasant weekend.

I just wanted to follow-up with you to see if you had any idea on the estimate for the conduit in WDC, Bethesda and Silver Spring.

Thanks.

David Noce

Director of Operations (DC & PA)

yIPes!.....that's fast

2100 Reston Pkwy., Suite 450

Reston, VA 20191

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3/7/2002

Exhibit-6

Wand, Mary E.

From: Wand, Mary E.
Sent: November 13, 2001 4:35 PM
To: Mike Boland (E-mail)
Cc: Bruce Holdridge (E-mail); Stan Moore Esq. (E-mail); 'erhee@yipes.com'
Subject: Attached Files



master pole and
conduit agreem...



Yipes Fiber Optic
IRU.DOC

ike, as promised, attached are a generic fiber IRU and a generic pole and conduit that we have prepared based on other agreements with utilities that we have worked with. We have attempted to incorporate into the fiber agreement the estimated costs that have been provided to Yipes by PEPCO but have a number of questions about how that pricing will work in reality, therefore the cost representations here may be confusing (at least they are to us). Yipes would like to move forward with this as soon as possible, so once you have had a chance to review please give me a call to discuss.

Regards,

Mary Wand
(415) 268-7201

Exhibit-7

Wand, Mary E.

From: Wand, Mary E.
Sent: December 04, 2001 6:02 PM
To: Mike Boland (E-mail)
Subject: FW: Attached Files



master pole and
conduit agreem...



Yipes Fiber Optic
IRU.DOC

i e, several weeks have passed since I had sent the "generic" agreements and I have not heard back from you. Could you let me know the status of this and when we can expect to hear back from you.

Mary E. Wand
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105
(415) 268 7201
(415) 268 7522 (facsimile)
mwand@mofo.com

-----Original Message-----

From: Wand, Mary E.
Sent: November 13, 2001 4:35 PM
To: Mike Boland (E-mail)
Cc: Bruce Holdridge (E-mail); Stan Moore Esq. (E-mail);
'erhee@yipes.com'
Subject: Attached Files

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Regards,

Mary Wand
(415) 268-7201

Exhibit-8

Wand, Mary E.

From: Wand, Mary E.
Sent: February 20, 2002 5:25 PM
To: Mike Boland (E-mail)
Subject: Attached Files



master pole and
conduit agreem...



Yipes Fiber Optic
IRU.DOC

Mike,

It has been over three months since I sent to you, at your request, draft conduit access and fiber agreements on behalf of Yipes Transmission. Although I have attempted to contact you a number of times since then, to follow up and bring this matter to a close, you have not returned my telephone calls or acknowledged receipt of the documents. Despite the passage of time, Yipes continues to require access to conduit in the DC area and intends to pursue such access in the form of an agreement with PEPCO.

In the off chance that you no longer have copies of the draft documents that I have previously sent I am attaching another set of documents to this message. I hope that this reminder will be sufficient to encourage PEPCO to alter its past practices and begin to negotiate in good faith with Yipes.

As you know, Yipes first contacted PEPCO regarding conduit access in January of 2001. My client has lost patience with PEPCO's ongoing practice of failing to negotiate in good faith in compliance with federal law. As a result, Yipes has requested that, if we have not reached an acceptable conduit access agreement in the very near future, we bring the matter to the attention of the Federal Communications Commission, either in the form of a complaint as provided for in the FCC's rules or through intervention in other proceedings, such as the pending Section 214 transfer application on behalf of Conectiv Communications, New RC, and PEPCO.

Please let me know immediately whether we can rapidly finalize a conduit agreement based on the drafts we have sent.

Regards,

Mary Wand
Morrison & Foerster LLP
(415) 268-7201

Exhibit-9

Wand, Mary E.

From: Wand, Mary E.
Sent: February 22, 2002 6:08 PM
To: Mike Boland (E-mail)
Cc: 'mherman@pepco.com'
Subject: FW: Attached Files



master pole and
conduit agreem...



Yipes Fiber Optic
IRU.DOC

i e -- It has been several days since I sent the message below and I have heard nothing from you. Do we need to escalate this matter within PEPCO in order to get it resolved?

Mary E. Wand
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105
(415) 268 7201
(415) 268 7522 (facsimile)
mwand@mofo.com

-----Original Message-----

From: Wand, Mary E.
Sent: February 20, 2002 5:25 PM
To: Mike Boland (E-mail)
Subject: Attached Files

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Regards,

Mary Wand
Morrison & Foerster LLP

Exhibit-10

Wand, Mary E.

From: mjboland@pepco.com
Sent: February 26, 2002 12:48 PM
To: Wand, Mary E.
Cc: mherman@pepco.com
Subject: Re: FW: Attached Files

Mary, I have received your reminder and expect to hear back from my client group shortly and will then respond accordingly. Thanks, Mike

Michael J. Boland
Assistant General Counsel
Potomac Electric Power Company
701 Ninth Street, N.W. Rm 1113
Washington DC 20068
202.872.2520
Fax 202.872.3281
Email: mjboland@pepco.com

"Wand, Mary E." <MWand@mofo.com>

02/22/2002 09:07 PM

To: "Mike Boland (E-mail)" <mjboland@pepco.com>
cc: mherman@pepco.com
Subject: FW: Attached Files

Mike -- It has been several days since I sent the message below and I have heard nothing from you. Do we need to escalate this matter within PEPCO in order to get it resolved?

Mary E. Wand
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105
(415) 268 7201
(415) 268 7522 (facsimile)
mwand@mofo.com

-----Original Message-----

From: Wand, Mary E.
Sent: February 20, 2002 5:25 PM
To: Mike Boland (E-mail)
Subject: Attached Files

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3/7/2002

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Please let me know immediately whether we can rapidly finalize a conduit agreement based on the drafts we have sent.

Regards,

Mary Wand

Morrison & Foerster LLP

(415) 268-7201

<<master pole and conduit agreement.DOC>> <<Yipes Fiber Optic IRU.DOC>>

=====

This message contains information which may be confidential and privileged. Unless you are the addressee (or authorized to receive for the addressee), you may not use, copy or disclose to anyone the message or any information contained in the message. If you have received the message in error, please advise the sender by reply e-mail @mofo.com, and delete the message. Thank you very much.

=====

3/7/2002